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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JANE DOE, Plaintiff and Respondent, v. GLOBALLOGIC, INC., Defendant and Appellant.	H044883 (Santa Clara County Super. Ct. No. 115CV282741)

Plaintiff Jane Doe filed a complaint for damages alleging sexual harassment, sexual discrimination, sexual battery, failure to prevent harassment, and negligent supervision and retention. She later amended the complaint to add claims that she was forced to resign in retaliation for her lawsuit. Defendant GlobalLogic, Inc. moved to compel arbitration. The trial court denied the motion. The trial court based its ruling on three grounds: (1) the arbitration agreement did not apply to plaintiff's dispute with defendant; (2) the agreement was unconscionable and therefore unenforceable; and (3) defendant had waived the right to seek arbitration.

Defendant appeals from the trial court's order denying its motion to compel arbitration, arguing that: (1) there was a valid and enforceable arbitration agreement; (2) the arbitration agreement was not unconscionable; and (3) it did not waive the right to arbitrate. We conclude that the arbitration agreement in question did not cover plaintiff's

claims against defendant. Moreover, even if the arbitration agreement did reach plaintiff's claims, substantial evidence supports the trial court's finding of waiver. Accordingly, we affirm the trial court's order.

I. Procedural and Factual Background

Plaintiff filed the original complaint on July 7, 2015. Defendant filed an answer on October 13, 2015, raising a general denial and affirmative defenses. On October 19, 2015, defendant filed its first case management statement, indicating that it desired a jury trial, that it expected the trial to take seven to 10 days, and that it expected witness depositions, expert depositions, witness discovery, and written discovery to be completed in six months. On January 15, 2016, defendant filed an additional case management statement, now indicating a request for a nonjury trial that would last seven to 10 days, with discovery completed by August 31, 2016. Defendant filed updated case management statements on April 16, 2016, and July 25, 2016, reiterating its expectation for a nonjury trial lasting seven to ten days, but indicating that discovery would take an additional six months. On July 26, 2016, defendant filed another case management statement clarifying that it wanted the court to "set a deadline for completion of mediation, ideally by December 2016, and encourage the parties to agree on a mediation date as soon as possible."

The parties noticed and held three depositions. On August 3, 2015, defendant deposed Aman Bawa. Later, defendant deposed plaintiff over the course of three days, from August 31, 2016, to September 2, 2016. Then, from September 20, 2016, to September 22, 2016, plaintiff took the deposition of defendant's human resources manager, Bonnie Helton. Plaintiff had attempted to take Helton's deposition earlier. Plaintiff first noticed Helton's deposition on October 29, 2015, to take place on December 9, 2015. Plaintiff then noticed Helton's deposition on July 11, 2016, to take

place on August 2 and 3, 2016. Plaintiff's third amended notice of deposition, served on July 22, 2016, resulted in Helton's deposition being taken on September 20 and 21, 2016. In a declaration filed in the trial court, plaintiff's trial counsel stated that "[p]laintiff's repeated attempts to take Bonnie Helton's deposition at an early stage in this litigation were repeatedly blocked and disputed by [defendant]." According to plaintiff's trial counsel, "[defendant] disputed and delayed [the first attempted deposition] by improperly claiming priority, asserting that Plaintiff's and her husband's depositions would have to go first despite the fact that [defendant] took the previously noticed depositions of Plaintiff and her husband off calendar." Plaintiff's trial counsel further asserted that defendant "would not cooperate" with plaintiff's attempts to "get Helton's deposition on track." In that respect, trial counsel stated that he served the second deposition notice to "get this critical discovery moving" but that "Helton's deposition was again disputed and blocked." The deposition was finally taken, pursuant to the third amended notice, after defendant "agreed to set the deposition of Helton after the deposition of Plaintiff."

In addition, defendant propounded interrogatories, a request for production of documents, and subpoenas. The parties also engaged in extensive motion practice. Defendant filed a variety of motions, including motions for a protective order, motions to compel, and a motion to quash a deposition subpoena.

On September 27, 2016, defendant filed a motion to compel arbitration. In its motion, defendant asserted that plaintiff was "co-employed by TriNet Corporation ('TriNet') and GlobalLogic." Defendant explained that "TriNet is a provider of comprehensive human resources services" and that TriNet "agreed to be Plaintiff Doe's 'employer of record for administrative purposes . . . .'" In that regard, TriNet was responsible for processing "'payroll, sponsor[ing] and administer[ing] benefits, and provid[ing] certain human resources services.'" Supervising and directing plaintiff's day-to-day work remained the responsibility of defendant, the "worksite employer."

Defendant further asserted that when plaintiff logged into the TriNet online portal for the first time, she acknowledged and accepted a "Terms and Conditions Agreement," which was incorporated into defendant's written offer of employment to plaintiff.

The Terms and Conditions Agreement contained a "Dispute Resolution Protocol" (DRP), which generally required arbitration. At the beginning of the DRP in section 9.a., "How the DRP Applies," the Terms and Conditions Agreement stated: "This DRP covers any dispute arising out of or relating to your employment with TriNet. . . . With only the exceptions described below, arbitration will replace going before a government agency or a court for a judge or jury trial." In section 9.f., "Enforcement Of The DRP," it provided: "This DRP is the full and complete agreement relating to arbitration as the means to resolve covered disputes between you and TriNet and between you and your worksite employer unless the DRP is waived by your worksite employer or superseded by other terms and conditions of your employment with your worksite employer. . . . With respect to covered disputes, each party waives any right under the law for a jury trial and agrees to arbitration in accordance with the terms of this DRP." In section 9.d., "How Arbitration Proceedings Are Conducted," it further provided: "In arbitration, the parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses. The specific provisions of this DRP and applicable rules of AAA [American Arbitration Association] or JAMS [Judicial Arbitration and Mediation Services, Inc.] will direct the arbitrator in decisions regarding the enforceability of this DRP and in conducting the arbitration."

The trial court denied the motion. First, the court found that the arbitration agreement applied only to disputes involving defendant's human resources provider, TriNet, and did not extend to disputes regarding plaintiff's employment with defendant. The court noted that the Terms and Conditions Agreement, with respect to the DRP, only

referenced plaintiff's "employment with TriNet," and that other employment documents made directly with defendant did not mention arbitration or were otherwise inconsistent with an intent to retain the right to arbitrate. Second, the court determined that the DRP was procedurally and substantively unconscionable, and therefore unenforceable. Finally, the court determined that defendant had "waived its right to seek arbitration by its litigation conduct inconsistent with an intent to seek to compel arbitration." Specifically, the court noted that the case file already "consume[d] well over 24 volumes," that "[b]oth parties have filed multiple discovery motions," that defendant "did not [previously] allege binding arbitration as a defense," and that defendant "did not mention arbitration in its case management statements." Moreover, the court observed that the case was filed in July 2015 and answered by defendant in August 2015,[1] but that defendant "waited for well over a year" to file a motion to compel arbitration and in the meantime participated in "substantial discovery and motion practice before filing its motion."

II. Discussion

A. Scope of Arbitration

Defendant argues that the arbitration agreement contained in the Terms and Conditions Agreement was a valid agreement between plaintiff and defendant, and it applied to all of plaintiff's claims. Moreover, defendant asserts that even if this court finds that the arbitration agreement did not "equally bind[]" the two parties, defendant "would still be entitled to enforce the agreement as a third party beneficiary."

"We review the scope of an arbitration provision de novo when, as here, that interpretation does not depend on conflicting extrinsic evidence." (*RN Solution, Inc. v.*

[1] The record on appeal reflects defendant answered the complaint in October 2015. It is unclear to what pleading the trial court was referring; however, any discrepancy as to the date of the answer is not significantly material to our analysis.

Catholic Healthcare West (2008) 165 Cal.App.4th 1511, 1522.) "The scope of arbitration is a matter of agreement between the parties." (*Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell* (1999) 76 Cal.App.4th 227, 230 (*Larkin*).) "A party can be compelled to arbitrate only those issues it has agreed to arbitrate." (*Ibid.*) Thus, "the terms of the specific arbitration clause under consideration must reasonably cover the dispute as to which arbitration is requested." (*Bono v. David* (2007) 147 Cal.App.4th 1055, 1063 (*Bono*).) For that reason, "the contractual terms themselves must be carefully examined before the parties to the contract can be ordered to arbitration" by the court. (*Ibid.*)

Based on the allegations of the original complaint and the amended complaint, we conclude that the DRP in the Terms and Conditions Agreement does not cover plaintiff's claims against defendant. Relevant here, the Terms and Conditions Agreement states: "This DRP is the full and complete agreement relating to arbitration as the means to resolve *covered disputes* between you and TriNet and between you and your worksite employer. . . . With respect to *covered disputes*, each party waives any rights under the law for a jury trial and agrees to arbitration in accordance with the terms of this DRP." (Italics added.) Significantly, regarding the definition of covered disputes and thus the scope of the DRP, the Terms and Conditions Agreement provides: "This DRP covers any dispute arising out of or relating to your employment *with TriNet*." (Italics added.)

Taken together, the plain terms of the DRP in the Terms and Conditions Agreement only cover disputes "arising out of or relating to" plaintiff's employment with TriNet, which was responsible for processing "'payroll, sponsor[ing] and administer[ing] benefits, and provid[ing] certain human resources services.'" Supervising and directing plaintiff's day-to-day work remained the responsibility of defendant, the "worksite employer." Plaintiff's claims were not directed at TriNet and did not involve payroll, benefits, or certain human resources services. Rather, as reflected in the original

complaint and amended complaint, plaintiff's dispute arises out of and relates to her employment with defendant, her "worksite employer."

Defendant argues that, although section 9.a. states that covered disputes are those arising out of the employee's "employment with TriNet," section 9.f. broadens the scope of the arbitration agreement to also cover disputes "between [the employee] and [the] worksite employer." Defendant's construction of the arbitration agreement, however, is not reasonable, as it would require this court to add language to the agreement. Section 9.f. simply refers to "covered disputes," without defining what those covered disputes encompass. Section 9.a., in contrast, specifically describes what types of disputes are "cover[ed]," and limits that coverage to disputes relating to "employment with TriNet." The only reasonable construction of the language in sections 9.a. and 9.f. is that the arbitration agreement "covers any dispute arising out of or relating to [an employee's] *employment with TriNet*," including where the employee seeks to *also* hold the worksite employer liable for *TriNet's* wrongdoing ("arbitration [is] the means to resolve covered disputes . . . between you and your worksite employer"). (Italics added.) (See *Bono, supra,* 147 Cal.App.4th at p. 1063.)

Finally, defendant's argument that it should be entitled to enforce the arbitration provision as a third party beneficiary is misplaced. Whether or not defendant was a party to the agreement, even as a third party beneficiary, defendant cannot assert rights greater than those that exist under the contract. (See *Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 132-133.) In other words, even as a third party beneficiary, defendant cannot expand the scope of coverage of the arbitration agreement.

Based on the foregoing, we conclude that the scope of the arbitration agreement in question does not cover plaintiff's claims against defendant. Therefore, the trial court properly denied defendant's motion to compel arbitration. Moreover, as explained

below, even if the arbitration agreement were read to encompass plaintiff's claims, we find substantial evidence supports the trial court's finding of waiver.

B. Waiver of Right to Arbitrate

"Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] 'When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.'" (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196 (*St. Agnes*).) Here, the parties agree that there is substantial disagreement as to what inferences may reasonably be drawn from the undisputed facts. Thus, we review for substantial evidence and may not reverse the trial court's finding of waiver "unless the record as a matter of law compels finding nonwaiver." (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211.) This court construes "any reasonable inference in the manner most favorable to the judgment" and "resolv[es] all ambiguities" in favor of the trial court's decision. (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 946 (*Burton*).)

"No single test defines the conduct that will constitute waiver of an arbitration right. Rather, courts look to a number of factors to determine whether waiver has occurred." (*Oregel v. PacPizza, LLC* (2015) 237 Cal.App.4th 342, 354-355 (*Oregel*).) "'In determining waiver, a court can consider "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim

without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party."'" (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.)

Substantial evidence supports the trial court's explicit findings as to the first, second, and third factors, as well as the court's implied findings as to the sixth factor. As to the fourth factor, it is not relevant because defendant did not file a counterclaim. The fifth factor is neutral because it is unclear if the discovery procedures used are unavailable in arbitration.

Turning to the first three factors, the trial court made explicit findings that defendant's actions had been wholly inconsistent with the right to arbitrate, that defendant had delayed in seeking a stay, and that defendant had already "participated in substantial discovery and motion practice before filing its motion." The trial court pointed to: (1) the volume of discovery; (2) the absence of any assertion of arbitration in defendant's case management statements; (3) the "well over a year" delay in filing the motion; and (4) defendant's participation in discovery and motion practice.

The record reflects that defendant's actions, up until it moved to arbitrate, were inconsistent with the right to arbitrate. First, defendant did not assert arbitration as an affirmative defense in its answer, even though an agreement to arbitrate is an affirmative defense to claims in a lawsuit. (*Oregel*, *supra*, 237 Cal.App.4th at p. 355; *Guess?*, *Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557-558 (*Guess?*).) Defendant similarly did not raise arbitration in its case management statements. Instead, defendant repeatedly asked for a nonjury trial, indicated that discovery would be completed within six months, stated its expectation that the trial would be last seven to 10 days, and otherwise failed to alert the parties or the court of its right to seek arbitration. Indeed, defendant's July 26, 2016, case management statement, filed approximately a year after the action began,

asked the trial court to help the parties complete judicial mediation "ideally by December 2016." The record also reflects that defendant noticed and held two depositions, propounded numerous discovery motions, and engaged in substantial motion practice.

In addition to the foregoing, we note that defendant knew or should have known about the DRP contained in the TriNet Terms and Conditions Agreement, but nevertheless has offered "no reasonable explanation" for why it waited over 14 months to compel arbitration. (See *Augusta v. Keehn & Associates* (2011) 193 Cal.App.4th 331, 338; see also *Guess?, supra*, 79 Cal.App.4th at p. 557 [finding waiver of right to arbitrate and noting that defendant "failed to offer any explanation for its decision to defer for three months its demand for arbitration"].) Defendant's actions were inconsistent with the right to arbitrate. Its participation in and invocation of the machinery of litigation, the amount of time that lapsed, and defendant's notable lack of explanation constitute substantial evidence supporting the trial court's findings related to the first three factors. (*St. Agnes*, *supra*, 31 Cal.4th at pp. 1195-1196; *Oregel*, *supra*, 237 Cal.App.4th at p. 356.)

Looking at the fifth factor—whether defendant has taken advantage of any judicial discovery procedures not available in arbitration—it is unclear whether this factor weighs for or against a finding waiver. (*St. Agnes*, *supra*, 31 Cal.4th at pp. 1195-1196.) Defendant asserts that it did not take advantage of judicial discovery procedures, pointing to the DRP, which provides that the parties are permitted to engage in "adequate civil discovery" in arbitration, and thus argues that plaintiff "cannot show that the parties obtained any material information through [judicial] discovery that they could not have obtained through discovery in arbitration." However, elsewhere in the DRP, the document states that while "adequate civil discovery" is permitted, "[t]he specific provisions of this DRP and the applicable rules of AAA or JAMS will direct the arbitrator . . . in conducting the arbitration." The parties submitted no evidence as to how

discovery under the applicable rules of AAA or JAMS differs from provisions of California law, or what rules direct the arbitrator to determine how much discovery is "adequate" in any given case. (Cf. *St. Agnes*, *supra*, 31 Cal.4th at p. 1204, fn. 7 [observing that arbitration agreement specifically provided that "'[c]ivil discovery . . . be conducted in accordance with the provisions of California law . . . in like circumstances [as by] a court of competent jurisdiction of the State of California'"].) This factor is therefore neutral in the analysis, although there is reason to suspect that the discovery procedures available in arbitration may differ.

As to the final sixth factor, substantial evidence supports the trial court's implied finding that defendant's delay in moving to compel arbitration prejudiced plaintiff. "'[W]hether litigation results in prejudice to the party opposing arbitration is critical in waiver determinations.'" (*Gloster v. Sonic Automotive, Inc.* (2014) 226 Cal.App.4th 438, 448.) "'"'The moving party's mere participation in litigation is not enough [to support a finding of waiver]; the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration.' [Citation.]" [Citations.]'" (*Ibid.*) "Prejudice will be found where the 'petitioning party's conduct has substantially undermined [the] important public policy [of arbitration as a speedy and relatively inexpensive means of dispute resolution] or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration.'" (*Oregel*, *supra*, 237 Cal.App.4th at p. 360.)

Plaintiff claims prejudice, points to the Helton deposition, and describes defendant's human resources manager as one of the "key witnesses" to the facts of the case. Plaintiff notes that Helton "testified 'I do not recall' or the equivalent 67 times." In a declaration filed in the trial court, plaintiff's trial counsel blamed defendant for the delay in Helton's deposition, asserting that defendant "improperly claim[ed] priority" and insisted that Helton's deposition take place after plaintiff's and her husband's deposition

"despite the fact that [defendant] took the previously noticed depositions of Plaintiff and her husband off calendar."

Defendant maintains that "[n]o prejudice occurred here" and therefore plaintiff cannot establish waiver. However, looking at the record and the timeline, we find substantial evidence supports the trial court's implied finding of prejudice. Plaintiff first noticed Helton's deposition on October 29, 2015, to take place on December 9, 2015. Unsuccessful, plaintiff next noticed Helton's deposition on July 11, 2016, to take place on August 2 and 3, 2016. Plaintiff's third amended deposition notice was served on July 22, 2016, with the deposition to take place September 20 and 21, 2016. Pursuant the third amended notice, Helton's deposition was finally taken on September 20 and 21, 2016, almost a year after plaintiff had originally tried to depose her. Moreover, as recounted by plaintiff's trial counsel, this delay was squarely the result of defendant's dilatory conduct, and plaintiff contends that it led this witness's memory to fade.

"Passage of time threatens the loss of evidence, the fading of memories, and the disappearance of witnesses." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 410 (*Norgart*); cf. *Thorup v. Dean Witter Reynolds, Inc.* (1986) 180 Cal.App.3d 228, 237 [finding no waiver of right to arbitrate because plaintiff had failed to show "actual prejudice," noting "[n]o significant delay was encountered resulting in the loss of relevant evidence"]; see also *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 784 [affirming trial court's finding of waiver where delay in seeking arbitration resulted in "faded memories and lost records"].) "California has a strong public policy in favor of arbitration. But that public policy is founded upon the notion that arbitration is a '"'speedy and relatively inexpensive means of dispute resolution.'"' [Citation.]" (*Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1452 (*Adolph*).)

Here, given the length of defendant's delay, defendant's actions "'substantially undermined [the] important public policy [of arbitration as a speedy and relatively

inexpensive means of dispute resolution] . . . .'" (*Oregel*, *supra*, 237 Cal.App.4th at p. 360; *Adolph*, *supra*, 184 Cal.App.4th at p. 1452.) Moreover, it "'substantially impaired [plaintiff's] ability to take advantage of the benefits and efficiencies of arbitration'" in this case. (*Oregel*, *supra*, 237 Cal.App.4th at p. 360.) The record shows that plaintiff attempted to take Helton's deposition early in the litigation, but was unable to do so until over a year after the filing of the original complaint, at which point Helton, described as a key witness, was unable to recall numerous events related to the litigation. (See *Norgart*, *supra*, 21 Cal.4th at p. 410.) Construing the evidence in a manner most favorable to the judgment, and resolving all ambiguities in favor of the trial court's decision, substantial evidence in the record supports the trial court's implied finding that defendant's conduct prejudiced plaintiff. (See *St. Agnes*, *supra*, 31 Cal.4th at p. 1196; *Burton*, *supra*, 190 Cal.App.4th at p. 946.)

Considering the relevant factors, and drawing inferences most favorable to the trial court's order, we conclude that substantial evidence supports the trial court's finding of waiver.

C. Revival of Right to Arbitrate

Defendant asserts that even if it initially waived its right to arbitrate, plaintiff's "filing of the First Amended Complaint revived that right." Accordingly, defendant argues that regardless of any prior waiver, the trial court should have found that plaintiff's amendment nullified its prior waiver. Defendant relies primarily on *Keating v. Superior Court* (1982) 31 Cal.3d 584 (*Keating*), overruled on another ground in *Southland Corporation v. Keating* (1984) 465 U.S. 1, 16. That reliance is misplaced. Although the language of *Keating*, in isolation, appears to support defendant's argument, the facts of the case suggest that the rule announced in *Keating* is far more limited in scope.

Keating involved four franchisees who sued Southland Corporation in individual actions, alleging fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of disclosure requirements. (*Keating, supra*, 31 Cal.3d at p. 591.) Franchisee Keating later filed a class action on behalf of a putative class of approximately 800 Southland franchisees, alleging claims similar to those alleged by the four individual franchisees. (*Id.* at p. 592.) Franchisee Keating also added claims that Southland's accounting practices were unfair and inaccurate. (*Ibid*.) The other four franchisees moved to amend and coordinate the individual cases. (*Ibid.*) The motion to coordinate was granted. (*Ibid.*) Southland moved to compel arbitration, and the trial court granted the motion, finding that Southland had not waived its right to compel arbitration despite the delay in seeking arbitration. (*Ibid*.)

The California Supreme Court agreed that Southland had not waived its right to arbitrate. (*Keating, supra*, 31 Cal.3d at p. 607.) In addition, the Supreme Court concluded that even if Southland had waived arbitration as to the four individual franchisees, that waiver was not effective in light of the amended complaint and the coordination with the class action, which sufficiently changed the proceedings to support a finding of no waiver: "[A]ssuming a waiver had occurred as to the charging allegations in the original complaints, such waiver would not extend to issues newly raised. [Citation.] In seeking coordination and amendment of their complaints, franchisees considerably expanded the scope of their pleadings, raising several new causes of action, injecting new factual elements, and refocusing the direction of their claims." (*Ibid.*) However, the court cautioned that the rule was a narrow one: "We do not suggest that an amendment to a complaint will, per se, nullify a previous, effective waiver of arbitration in every case. Here, however, franchisees directed a newly concerted attack, evidenced by the filing of amended complaints and the motion to coordinate. This sufficiently changed the proceedings, when viewed in their entirety, to permit the trial court to find a

lack of waiver of the right to arbitrate the closely interrelated and interdependent claims." (*Ibid.*)

The instant case does not fit this narrow exception. Although the first amended complaint added additional facts and causes of action related to retaliation, it did not "considerably expand[]" or "refocus[] the direction" of the case, nor did it "sufficiently change[] the proceedings" such that the trial court should have found lack of waiver. (See *Keating, supra*, 31 Cal.3d at p. 607.) Moreover, the first amended complaint did not seek to coordinate plaintiff's action or otherwise raise the specter of a class action. (*Ibid.*) The other case cited by defendant, *Krinsk v. SunTrust Banks, Inc.* (2011) 654 F.3d 1194 (*Krinsk*), is illustrative of the limited types of situations where revival of the right to arbitrate is found.

In *Krinsk*, the plaintiff initially filed a class action against SunTrust Bank, and then moved to file an amended complaint that offered a new definition for the proposed class, the effect of which was to "greatly enlarge[] the potential size of the putative class." (*Krinsk*, *supra*, 654 F.3d at p. 1199.) SunTrust Bank moved to compel arbitration, but the district court denied the motion, finding that the right to arbitrate had been waived. (*Id.* at p. 1196.) The Eleventh Circuit Court of Appeals reversed, concluding that the plaintiff's amended complaint "greatly broadened" the litigation by "opening the door to thousands—if not tens of thousands—of new class plaintiffs . . . ." (*Id.* at pp. 1203-1204.) The court reasoned that "[t]his vast augmentation of the putative class so altered the shape of litigation that, despite its prior invocations of the judicial process, SunTrust should have been allowed to rescind its waiver of its right to arbitration." (*Id.* at p. 1204.) The finding of a right to revival in *Krinsk* was not based on the addition of new claims, rather "[t]he substantial change that motivated the *Krinsk* decision was [based on] the substantial increase in the size of the plaintiff class and the resulting increase in the size of the defendant's potential liability. The defendant had

waived the right to arbitrate the claims of hundreds of plaintiffs, but it had not waived the right to arbitrate the claims of thousands, if not tens of thousands, of plaintiffs. [Citation.]" (*Collado v. J. & G. Transport, Inc.* (2016) 820 F.3d 1256, 1260.)

In the instant case, plaintiff's amended complaint did not result in a vast reshaping of the litigation. While it added claims for wrongful termination and constructive termination, retaliation, and gender discrimination, at base, plaintiff's case remained one that involved an employment dispute regarding defendant's handling of alleged sexual harassment and sexual assault committed by plaintiff's manager. Plaintiff's first amended complaint largely concerned facts that arose after she filed her original complaint, and so most of the new causes of action could not have been pleaded initially. Plaintiff's requested relief—including a request for "compensatory damages including lost past and future wages, commissions, and all other sums of money, including employment benefits, together with interest on said amounts, and any other economic injury to Plaintiff, according to proof"—was almost identical in both complaints. Finally, significantly, unlike in *Keating* or *Krinsk*, the amended complaint did not expand the number of litigants, nor did it represent a coordinated "newly concerted attack" by numerous existing or new litigants. (*Keating*, *supra*, 31 Cal.3d at p. 607; cf. *Krinsk*, *supra*, 654 F.3d at pp. 1199-1204.)

As the court emphasized in *Keating*, an amendment will not per se result in revival of the right to arbitrate; it will be found only in extraordinary circumstances. (*Keating*, *supra*, 31 Cal.3d at p. 607.) We conclude, when compared with the effect of the amended complaints in *Keating* and *Krinsk*, such circumstances are not present in the instant case. Therefore, we decline to find that defendant's right to arbitrate had been revived.

III. Disposition

The trial court's order denying the motion to compel arbitration is affirmed.

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Mihara, J.

I CONCUR:

_____
Elia, Acting P. J.

I CONCUR IN THE JUDGMENT ONLY:

_____
Bamattre-Manoukian, J.